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No. 82-

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STEERE TANK LINES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below erred by engrafting upon the provisions of the Motor Carrier Act of 1980 providing for removal of restrictions and broadening commodity descriptions a requirement found only in the provisions governing the issuance of new certificates for motor carrier operating authority, thus frustrating the intent of Congress in one of the single most important provisions of the Act.

2. Whether the court below improperly substituted its judgment for that of the Commission as to what constitutes a reasonable broadening of unduly restrictive motor carrier operating certificates.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 666 F.2d 255. The opinion of Division 1 of the Commission (App. E, *infra*, 15a) is unreported. The opinion of the Restriction Removal Board of the Commission (App. D, *infra*, 11a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 7a-8a) was entered on January 25, 1982. The Commission's timely petition for rehearing was denied on March 8, 1982 (App. C, *infra*, 9a-10a). The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of 49 U.S.C. 10101 and 10922, and 49 C.F.R. 1137 *et seq.*, are set forth at App. F, *infra*, 17a-39a.

STATEMENT

1. The passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) instituted a new era in the regulation of the motor carrier industry. As stated in Section 2 of the Act (Purpose of the Act), the new legislation was designed to "reduce unnecessary regulation by the Federal Government." Congress intended the Motor Carrier Act of 1980 to reform the inefficient and restrictive regulatory structure that had developed since the inception of Federal motor carrier regulation in 1935. See, *e.g.*, S. Rep. No. 96-641, 96th Cong., 2d Sess. 2-3 (1980); H. Rep. No. 96-1096, 96th Cong., 2d Sess. 2-3 (1980). In its attempt to correct the regulatory quagmire that had grown around the motor carrier industry, Congress amended the National Transportation Policy, 49 U.S.C. (Supp. III) 10101, with respect to the regulation of motor carriers of property, see Pub. L. No. 96-296, § 4, 94 Stat. 793-94, codified at 49 U.S.C. (Supp. IV) 10101(a), and revised and liberalized the standards for entry into the motor carrier industry in Section 5 of the Motor Carrier Act, codified at 49 U.S.C. (Supp. IV) 10922(b).

As a corollary to the liberalized entry standards, and of particular significance to this case, Congress enacted a new section to enable existing motor carriers of property to remove restrictions and broaden unduly narrow limitations that are found in their present operating authorities. Pub. L. No. 96-296, § 6, 94 Stat. 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h). This new section required the Commission

to establish procedures for the speedy processing of applications by carriers to remove restrictions and to expand the categories of commodities that can be transported under their certificates and permits.[1] Congress provided that the Commission should process restriction removal applications expeditiously and enumerated specific factors to be considered in granting or denying a restriction removal or authority broadening application. See 49 U.S.C. (Supp. IV) 10922(h)(2).

The Commission's rules and guidelines implementing 49 U.S.C. (Supp. IV) 10922(h) are found at 49 C.F.R. 1137 *et seq.* Along with procedures for processing restriction removal applications, the Commission developed guidelines for broadening commodity descriptions and removing territorial restrictions. For example, the guidelines provide guidance for broadening one or more named commodities in existing certificates to, *inter alia*, "a broader class descrip-

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[1] The Commission's implementation of the provisions of 49 U.S.C. (Supp. IV) 10922(h) may be found in the rules and guidelines promulgated in Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property*, 132 M.C.C. 374 (1980), codified at 49 C.F.R. 1137 *et seq.* Certain provisions of those guidelines, but not the procedural rules, were remanded for reconsideration by the Commission in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981). A Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been filed seeking review of that decision and the Writ of Mandamus issued by the court of appeals (*American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982)) to enforce its mandate in that proceeding. See *Interstate Commerce Commission* v. *American Trucking Associations, Inc.*, No. 82- (filed July 16, 1982).

tion generally accepted by the Commission, such as commodities in bulk . . ." 49 C.F.R. 1137.21(b)(3). This type of broadening was considered reasonable where the carrier was already performing bulk service, and, by broadening one bulk commodity to all commodities in bulk, the carrier was merely expanding within its field of service to provide complete service consistent with the Congressional concerns expressed in the Congressional Findings sections of the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3 (a), 94 Stat. 793. See generally Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property*, 132 M.C.C. 374 (1980), *aff'd in part, rev'd in part sub nom. American Trucking Associations, Inc.* v *ICC*, 659 F.2d 452 (5th Cir. 1981).

2. In January 1981, soon after the Commission's rules and guidelines for restriction removal applications became effective, The Maxwell Company (Maxwell) applied to the Commission, *inter alia*,[2] to broaden the commodity description in one of its existing certificates from "spent silica gel catalyst, in bulk" to "commodities in bulk."[3] Maxwell provided all of the information required by 49 U.S.C. (Supp. IV) 10922(h)(2) and the Commission's rule implementing

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[2] Maxwell also sought to broaden the territorial scope of its certificate by removing restrictions against service involving named cities and states. This territorial restriction removal was not challenged by any parties to the proceeding.

[3] Maxwell's existing certificate authorizing the transportation of "spent silica gel catalyst, in bulk" restricted it to the transportation of only that one commodity. Spent silica gel catalyst is a commodity in general usage in the petroleum processing industry, and is used by petroleum refineries to convert raw petroleum products into fuel products.

that section, 49 C.F.R. 1137.10(c), and submitted a copy of its existing certificate. Notice of the application was published in the *Federal Register*, and in response, two carriers (Steere Tank Lines, Inc., and Ruan Transport Corporation) filed comments.[4] Both commenting carriers objected to the commodity broadening, asserting that it was not reasonable as contemplated by Congress under 49 U.S.C. (Supp. IV) 10922(h).

The Commission's Restriction Removal Board, an employee review board empowered to decide restriction removal cases under 49 C.F.R. 1011.6(*l*), concluded that the application should be granted. (App. D, *infra*, 11a-13a). The Board made findings that the proposed broadened operations "will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will enable applicant to provide full service to a broader range of shippers and in rural communities, and will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a)," as required by 49 U.S.C. (Supp. IV) 10922(h)(2). (App. D, *infra*, 12a).

3. Although Restriction Removal Board decisions are administratively final, and appeals are allowed only under extraordinary circumstances, see 49 C.F.R. 1137.14(c), Steere sought reconsideration of the Board's decision, asserting that the Commission's action exceeded the agency's jurisdiction under 49 U.S.C. (Supp. IV) 10922(h). The Commission, by Division 1, concluded that no extraordinary circumstances existed, and denied the appeal. (App. E, *infra*, 15a).

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[4] 49 U.S.C. (Supp. IV) 10922(h)(2) provides that interested parties should have the opportunity "to comment" on restriction removal proposals.

4. On judicial review, decided under the court of appeals' summary calendar procedures without oral argument, the court remanded the proceeding to the Commission for reconsideration in light of its decision in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981). (App. A, *infra*, 2a-6a). The court declared that its decision in *American Trucking Associations, supra*, required that Steere's petition for review be granted (*id.* at 3a).

The court observed that Maxwell's restriction removal application mirrored the Commission guidelines (49 C.F.R. 1137.21(b)) that were found invalid in *American Trucking Associations, supra* (App. A, *infra*, 4a).[5] The court of appeals did recognize that the description in Maxwell's certificate "was an example of the overly-restrictive certificates that Congress condemned in the Motor Carrier Act." (App. A, *infra*, 5a). However, the court noted that the expanded certificate would enable Maxwell to haul all commodities in bulk, and "[i]t is likely that Maxwell . . . is either unversed or uninterested in hauling many" of those goods (*ibid.*). The court continued (*ibid.*):

> The record contains no evidence to support a conclusion that the carrier is "fit, willing, and able to provide the transportation authorized by the certificate." 49 U.S.C.A. § 10922(a)(1)(A).

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[5] The court discussed its *American Trucking Associations* decision, reiterating that in *American Trucking Associations* the restriction removal guidelines were found invalid because they failed to take into account a carrier's fitness, willingness, and ability to perform the transportation authorized by its broadened certificate, 659 F.2d at 464, and because a carrier must be permitted to deviate from the suggested guidelines, 659 F.2d at 464-65. (App. A, *infra*, 4a-5a).

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing, and able to provide the transportation for which it is seeking authority.

As the court perceived it, the Commission had failed to reasonably broaden Maxwell's certificate because the agency had not considered the carrier's fitness, willingness, and ability to perform every conceivable facet of the operations which would be authorized by its certificate as expanded (App. A, *infra*, 6a). In fact, Steere had not raised before the court of appeals (or the Commission) the question of Maxwell's fitness, willingness, and ability (see 49 U.S.C. (Supp. IV) 10922(b)(1)(A)) to perform operations under the broadened certificate, but instead had asserted that Maxwell had not established a public need for the service (see 49 U.S.C. (Supp. IV) 10922(b)(1)(B)). The Court did not rule on this contention, but rather based its holding upon Maxwell's failure to establish a *prima facie* case that it was fit, willing, and able to transport all of the commodities which could be transported under its expanded certificate.

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision requiring a carrier to establish its fitness, willingness, and ability as part of its *prima facie* case in seeking to remove a restriction or broaden a commodity description is contrary to the spirit and purpose of the Motor Carrier Act of 1980, will seriously hinder the effective administration of the Act, and presents important and recurring questions warranting this Court's review.

The Motor Carrier Act of 1980 gave the Commission clear and explicit instructions regarding the re-

moval of restrictions and the broadening of commodity descriptions in the existing certificates held by motor carriers of property. The action of the court of appeals violates the spirit and the letter of those instructions. Pursuant to 49 U.S.C. (Supp. IV) 10922(h)(1)(B)(i), a motor carrier may seek to "reasonably broaden the categories of property authorized by [its] certificate or permit." In determining whether such an application should be granted, the statute (49 U.S.C. (Supp. IV) 10922(h)(2)) provides standards that the Commission should consider:

> In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101 (a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

The requirements of 49 U.S.C. (Supp. IV) 10922(h)(2) are the sole considerations that Congress directed the Commission to take into account in deciding whether to grant or to deny a restriction removal application; no others were directed by Congress, although the Commission is authorized, in its discretion, to consider "other things".

The specific considerations for restriction removals established by Congress in 49 U.S.C. (Supp. IV) 10922(h)(2) directly reflect Congress' concerns that the myriad of restrictions on existing operating authorities hampered efficient motor carrier operations. Under 49 U.S.C. (Supp. IV) 10922(h)(2), the Commission must consider, *inter alia*, the effect on energy

resources, cost savings, improved operating efficiency, and the effect on service to small and rural communities. These are precisely the public interest factors that Congress believed were abandoned in favor of protective regulatory practices prior to the 1980 legislation. See, *e.g.*, Pub. L. No. 96-296, § 3(a), 94 Stat. 793 (Congressional Findings); S. Rep. No. 96-641, 96th Cong., 2d Sess. 3, 7 (1980); H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3, 17-18 (1980).

Section 10922(h)(2) is precise in setting forth considerations the Commission must take into account in restriction removal applications. The tripartite test of fit, willing, and able is not among these factors. That test is found at 49 U.S.C. (Supp. IV) 10922(b)(1)(A) (the provision governing applications for new authority), but not in 49 U.S.C. (Supp. IV) 10922(h)(2). The court of appeals, by engrafting the tripartite test from a separate section on the restriction removal section, impermissibly rewrote the statute in a manner not intended by Congress. See, *e.g.*, *United States* v. *American Trucking Association, Inc.*, 310 U.S. 534, 543-44 (1940). It is a basic rule of statutory construction that "when a term is carefully employed in one place and excluded in another, it should not be implied where excluded." *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514-15 (1963); *American Trucking Associations, Inc.* v. *ICC*, 672 F.2d 850 (11th Cir. 1982). See *United States* v. *Sisson*, 399 U.S. 267, 298 (1970). Had Congress meant a carrier's fitness, willingness, and ability to be a consideration in restriction removal applications, it easily could have and should have said so, as it did in reference to new authorities. See *Ferguson* v. *Skrupa*, 372 U.S. 726 (1973); *American Trucking Associations, Inc.* v. *ICC*, *supra*, 672 F.2d at 853.

It is beyond question that Congress mandated the expeditious processing of restriction removal applications in simplified proceedings, unencumbered by the requirements attendant to applications for new authority. See *American Trucking Associations, Inc.* v. *ICC, supra*, 659 F.2d at 460-61. Compare 49 U.S.C. (Supp. IV) 10922(h)(2) (considerations for restriction removal applications and a 120 day time limit for processing applications) with 49 U.S.C. (Supp. IV) 10922(b) (considerations for new authority applications) and 10322(b)(1), (d) and (f) (270 day time limit for processing new authority applications). By engrafting a requirement not found in section 10922(h)(2) onto the considerations the Commission must take into account in considering restriction removal applications, the court of appeals increased the burden on the Commission in a manner not intended by Congress, thus intruding on the Commission's administration of the Motor Carrier Act of 1980.

By inserting the tripartite "fit, willing, and able" test of 49 U.S.C. (Supp. IV) 10922(b)(1)(A) into the restriction removal proceedings under 49 U.S.C. (Supp. IV) 10922(h), the court of appeals also placed a significant limitation on the Commission's ability to implement the policies of the Motor Carrier Act of 1980 and to administer the Act and Congress' policies. The court's action contravenes important Congressional policies regarding the regulation of the national motor carrier system. The Interstate Commerce Commission is charged with regulating the motor carrier industry consistent with the National Transportation Policy and the policy directives of Congress. More specifically, Congress set out in the Motor Carrier Act of 1980 to free the motor

carrier industry from (Pub. L. No. 96-26, § 3(a), 94 Stat. 793 (Congressional Findings)):

> the existing regulatory structure [that] has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; [and the] protective regulation [that] has resulted in some operating inefficiencies and some anticompetitive pricing . . .

By adding a factor not contemplated by Congress to restriction removal proceedings, the court of appeals may significantly impede the Commission's ability to meet these concerns and to implement national transportation policies.[6] See *Central Freight Lines, Inc.* v.

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[6] One possible way that Congress' intent may be frustrated is the apparent blurring by the court of appeals of the distinction between applications for new operating authority and for the removal of restrictions from existing authorities. Congress established restriction removal proceedings as an expeditious method of removing from existing operating authorities restrictions that result in operating inefficiencies or wasted energy resources, or prevents service to small and rural communities. See 49 U.S.C. (Supp. IV) 10101(a)(7) and 10922(h)(2). By engrafting the fit, willing, and able test found at 49 U.S.C. (Supp. IV) 10922(b)(1)(A), the court placed on a restriction removal applicant an added burden that will impede the expeditious removal of restrictions that so troubled Congress.

Moreover, the court of appeals could, logically and consistently with its decision in this case, next require a restriction removal applicant to demonstrate that its proposal "will serve a useful public purpose, responsive to a public demand or need." 49 U.S.C. (Supp. IV) 10922(b)(1)(B). Such an action would completely emasculate the restriction removal section, turning it into the equivalent of an application for new authority. Thus, one of the most important sections of the Motor Carrier Act of 1980 would be rendered useless.

United States, 669 F.2d 1063, 1071-72 (5th Cir. 1982), where a different panel of the same court of appeals recognized that requiring a full analysis of operational feasibility in every motor carrier application, a factor not specifically mandated by the statute, would frustrate the policies and goals of the Motor Carrier Act of 1980.

2. The action of the court of appeals further impedes the Commission's implementation and administration of the Motor Carrier Act of 1980 by substituting the judgment of the court for that of the Commission in determining what constitutes a reasonable broadening of commodity descriptions under the restriction removal section, 49 U.S.C. (Supp. IV) 10922(h)(1)(B)(i).

In its implementing rules and guidelines, 49 C.F.R. 1137 *et seq.*, the Commission determined what would be considered a reasonable broadening of commodity descriptions in existing certificates. In *American Trucking Associations, supra*, 659 F.2d 452, the court of appeals found that those guidelines, if used without the opportunity for deviation, could compel an applicant to seek a broadening of its authority beyond its desires or capabilities. That problem is not presented on the present record because Maxwell had made clear its desire to obtain a broadening of its existing certificate which would authorize it to expand its field of service so as to provide a complete bulk service. Thus, in overturning the Commission's broadening of Maxwell's commodity description in this proceeding, the court of appeals went beyond its holding in *American Trucking Associations, supra*, 659 F.2d 452. Its holding here suggests that a carrier which has been transporting a single commodity within a field of service (such as transportation of

commodities of bulk) cannot as a matter of law obtain a broadening of the commodity description in its certificate to encompass the entire field of service. Similarly under this decision a carrier transporting a single commodity may be foreclosed from broadening this authority to include all commodities within the various classifications adopted by the Commission and which the court of appeals in the *American Trucking Associations* decision found to be "a good starting point" in effecting the Congressional purpose of eliminating unduly narrow certificates. This concern is heightened by the fact that the court of appeals in its mandamus decision clarifying its October 1, 1981, *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982), mandate, which is the subject of a separate petition for certiorari in No. 82- (filed July 16, 1982), explicitly held with respect to grants of new authority that "the Commission . . . may not assume that an applicant fit, willing, and able to carry one commodity in an STCC classification, is fit, willing and able to carry all commodities in that classification" (669 F.2d at 963).

Congress clearly vested jurisdiction in the Commission to determine whether a restriction removal is reasonable. It required that an expeditious procedure for processing requests by existing carriers be established. In an effort to comply with these requirements the Commission set forth guidance to potential applicants as to what would generally be considered a reasonable broadening so as to facilitate framing and consideration of the applications. It is not the province of the court of appeals to substitute its judgment for that of the Commission as to the scope or procedures to be followed in complying with this

Congressional mandate. *E.g.*, *Ralston Purina Co.* v. *Louisville & N.R.R. Co.*, 426 U.S. 476, 477 (1976); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). Yet that is exactly what the court of appeals did. Moreover, as this Court recently observed, "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). By substituting its judgment for that of the Commission, the action of the court of appeals improperly rejects the Commission's construction of the statute and undermines the Commission's implementation and administration of this important section of the Motor Carrier Act of 1980.

The court below has frequently recited the proposition that implementation of the various provisions of the Motor Carrier Act of 1980 is for the Commission. Thus in the proceeding below the court of appeals stated (App. A, *infra*, 6a):

> We do not suggest that such a showing [of fitness] must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

At the same time the court has cast such a cloud upon the validity of the procedures at the heart of the Commission's implementation of the restriction removal provisions of the Act as to render them useless.

CONCLUSION

The petition for a writ of certiorari should be granted.[1]

Respectfully submitted.

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JULY 1982

[1] The Court may wish to consider consolidation of this proceeding with *Interstate Commerce Commission* v. *American Trucking Associations, Inc.*, No. 82- (petition for certiorari filed July 16, 1982), which involves similar issues concerning the Motor Carrier Act of 1980.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-4169

Summary Calendar

STEERE TANK LINES, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Jan. 25, 1982

Petition was filed for review of order of Interstate Commerce Commission granting carriers application to remove a restriction on latter's authorization to transport goods. The Court of Appeals held that: (1) removal of restriction limiting carrier to transporting spent silica gel catalyst in bulk and authorizing transportation of commodities in bulk was invalid where expansion was authorized under ICC guidelines which contravened authority granted under Motor Carrier Act, and (2) an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization.

Remanded.

1. Commerce [Key] 85.28(4)

Where under prior authorization carrier could transport spent silica gel catalyst in bulk, grant of new authorization to transport commodities in bulk violated Motor Carrier Act where genesis thereof was

ICC restriction removal guidelines, which compel an applicant to use suggested categories and which are phases in terms of replacing restrictive authorization with broader authorization such as "commodities in bulk," and there was no evidence that carrier was fit, willing and able to provide the newly authorized transportation. Revised Interstate Commerce Act, 49 U.S.C.A. §§ 10101 et seq., 10922(a)(1), (a)(1)(A), (h)(1).

2. Commerce [Key] 105

An applicant seeking benefits Motor Carrier Act's command to reasonably broaden categories of the property authorized should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization and what form such showing should take and how detailed it should be are, in the first instance, matters that should be addressed by Interstate Commerce Commission. Revised Interstate Commerce Act, 49 U.S.C.A. §§ 10922(a)(1)(A), (h)(1).

Petition for Review of an Order of the Interstate Commerce Commission

Before CLARK, Chief Judge, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

[1] Steere challenges the Interstate Commerce Commission's grant of an application by the Maxwell Company to remove a restriction on Maxwell's authorization to transport goods. Under Maxwell's previous authorization, it could transport "spent silica gel catalyst, in bulk." The new authorization empowers Maxwell to transport "commodities in bulk,"

without further restriction. The genesis of the ICC's decision is its "Guidelines" for removal of restrictions on commodities that a carrier may transport. 49 C.F.R. § 1137.21(b). In Steere's view, these guidelines contravene the ICC's authority under the Motor Carrier Act of 1980, and, therefore, the broadened certificate granted to Maxwell is invalid. Under our decision in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981), Steere's petition must be granted.

The Motor Carrier Act of 1980 authorizes the ICC to lift unreasonable restrictions from the certificates that authorize motor carriers to transport goods. 49 U.S.C.A. § 10922(h)(1). To implement this statutory aim, the Commission issued guidelines for processing restriction-removal applications. The guidelines inform an applicant who is authorized only to haul "one or more named commodities" that the ICC will routinely grant an application for broader authorization framed in terms of the Commission's generally accepted categories, such as "commodities in bulk." 49 C.F.R. § 1137.21(b).[1]

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[1] § 1137.21 provides in relevant part:

(b) *Where a carrier is authorized to transport one or more named commodities, the authority is considered unduly restrictive* and may normally be broadened under these procedures.

Use of these procedures is normally appropriate for applications which seek—

(1) to expend [sic] such a commodity authorization to the two-digit STCC level;

(2) to replace such an authorization with a commodity description contained in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953); or,

(3) *to replace such an authorization with a broader class description generally accepted by the Commission,*

The Commission's guidelines ineluctably compel an applicant to use the categories suggested by the Commission. *American Trucking Associations*, 659 F.2d at 463.[2] Maxwell's application did track the Commission's language, requesting the removal of the restriction to "spent silica gel catalysts, in bulk" and the substitution of an authorization to transport "commodities in bulk." Pursuant to its rule, the Commission granted the restriction-removal application.

In *American Trucking Associations*, this Court reviewed portions of the ICC's guidelines implementing the Motor Carrier Act's command "to reasonably broaden the categories of property authorized." 49 U.S.C.A. § 10922(h)(1). We interpreted the Commission's guidelines to force an applicant for the removal of restrictions to adopt the broad categories suggested by the Commission. 659 F.2d at 463-64. We held that these categories failed to account for the Motor Carrier Act's mandate that every carrier be "fit, willing, and able to provide the transportation to be authorized by the certificate." 49 U.S.C.A. § 10922(a)(1); 659 F.2d at 464. We noted that the Commission's formulas for removing restrictions on certificates make "it likely that a carrier with authority to transport only one commodity who desires to transport only one additional commodity would be

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such as commodities in bulk, commodities which because of their size or weight require special equipment, or oilfield commodities as described in *Mercer Extension-Oilfield Commodities*, 74 M.C.C. 459 (1946).

(emphasis supplied).

[2] Because of their coercive effect, *American Trucking Associations* held that these guidelines actually are rules which warrant more stringent judicial review. 659 F.2d at 464 and n. 50.

required to seek authority for an entire class of commodities, some of which the carrier may not wish to transport or may lack the ability to transport." 659 F.2d at 462. These observations led us to conclude that the guidelines were infirm because they fail to provide for "reasonable broadening" of the category of products each carrier is authorized to haul. Therefore, we held that:

> The carrier must be permitted, both by the Commission's express statement and actual agency practice, to seek some other commodity classification if it can show that use of the tripartite commission standard would require the transportation of commodities unrelated to those previously authorized or would require the institution of a different type of service, and that the carrier is not fit or is unwilling or is unable to provide the service. The procedure for seeking such a modification must be reasonably flexible so that applications will neither be arbitrarily prejudged nor condemned to excessive expense. Finally, there must be some opportunity for opposition to an application to be voiced.

Silica gel is a catalyst used in processing petroleum. Because the catalyst is exhausted through use, it must be periodically replaced. Maxwell hauls this "spent silica gel in bulk." Its former certificate limited it to hauling this one item. As such, the certificate was an example of the overly-restrictive certificates that Congress condemned in the Motor Carrier Act.

[2] But the new category that the Commission has awarded Maxwell includes all products hauled in

bulk.[3] Maxwell is now authorized to carry all petroleum products, all non-petroleum chemicals, all ores and minerals, tequila, Coca-Cola syrup, milk, liquid feed, dry fertilizer, flour, sugar, and a virtually unlimited list of other bulk goods. It is likely that Maxwell is fully competent to haul some of these goods but is either unversed or uninterested in hauling many others. The record contains no evidence to support a conclusion that the carrier is "fit, willing, and able to provide the transportation authorized by the certificate." 49 U.S.C.A. § 10922(a)(1)(A). We believe that an applicant for removal of a restriction should be required to make a prime facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization. We do not suggest that such a showing must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

We remand to the Interstate Commerce Commission for reconsideration in the light of our decision in *American Trucking Associations* v. *I.C.C.*, 659 F.2d 452 (5th Cir. 1981). Costs are to be divided equally.

REMANDED.

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[3] According to the respondent ICC:

> Bulk service is the transportation of fungible commodities which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece. The term "in bulk" commonly refers to a loose mass which is poured or thrown into a vessel or vehicle without regard to order, and which is restrained during transportation only by the side of the carrying vessel.

Brief for Respondent at 18 n.12 (citations omitted).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4169

Summary Calendar

ICC No. MC117344 (Sub-No. 285)X

STEERE TANK LINES, INC., PETITIONER

versus

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the
Interstate Commerce Commission

Before CLARK, Chief Judge, RANDALL and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of the State of Texas for review of an order of the Interstate Commerce Commission and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the Interstate Commerce Commission in this cause be, and the same is hereby remanded for further proceedings to the Interstate Commerce Commission.

IT IS FURTHER ORDERED that the costs on appeal be taxed equally by the Clerk of this Court against petitioner and respondents.

January 25, 1982

A true copy

Test:

GILBERT F. GANUCHEAU
Clerk
U.S. Court of Appeals
Fifth Circuit

By /s/ R. A. Barnes
Deputy
Mar. 18, 1982
New Orleans, Louisiana

Issued as Mandate: Mar. 18, 1982

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4169

Summary Calendar

STEERE TANK LINES, INC., PETITIONER

versus

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the
Interstate Commerce Commission

ON SUGGESION FOR REHEARING EN BANC

(Opinion January 25, 5 Cir., 1982, —— F.2d ——)

(March 8, 1982)

Before CLARK, Chief Judge, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that

the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED. ( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX D

RRB

Service Date
Mar. 23, 1981

INTERSTATE COMMERCE COMMISSION
DECISION

No. MC-117344 (Sub-No. 285) X

THE MAXWELL CO.—
COMMODITY AND TERRITORIAL BROADENING
(Cincinnati, OH)

Decided: March 12, 1981

By an application filed January 21, 1981, The Maxwell Co. seeks to remove restrictions (under the provisions of 49 CFR Part 1137, *et seq.*) in its Sub-No. 181 certificate to broaden the commodity and territorial scope of its authority to authorize operations as set forth in the appendix. Steere Tank Lines, Inc. and Ruan Transport Corporation has filed a comment in opposition to the application. Applicant filed a reply.

Steere argues that applicant has not shown that the involved commodity and territorial broadening would have a positive effect upon any of the four factors set forth in 49 CFR 1137.10(c). It also argues that we should not act on the application because Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property* is pending review by the U.S. Court of Appeals, 5th Circuit, in No. 81-4026, *American Trucking Association, Inc., et al.* v. *Interstate Commerce Commission.* Ruan basically argues that it holds authority conflicting with the reformed authority ap-

plicant seeks, and that a grant of the application will result in traffic diversion.

Based on the information presented, we conclude that a grant of the application will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will enable applicant to provide full service to a broader range of shippers and in rural communities, and will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a). Regarding the pending Court action, we note that no stay has been issued pending review. Accordingly, there is no legal impediment to rendering a decision in this application proceeding.

It is ordered:

The restriction removal application is granted to the extent set forth in the appendix.

The attached *certificate* will become effective 45 days after the service date of this decision, unless the Commission stays the effective date by accepting an appeal for consideration.

After the effective date, operations can begin upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agents (49 CFR 1044), and tariffs (49 CFR 1310).

The certificate served here supersedes applicant's Sub-No. 181.

By the Commission, Restriction Removal Board, Members Sporn, Alspaugh, and Shaffer.

/s/ Agatha L. Mergenovich
AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *commodities in bulk*, between points in Colorado, Delaware, Maryland, New Jersey, New York, Pennsylvania, Virginia, Arkansas, Missouri, Louisiana, Texas, Oklahoma, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Ohio, Wisconsin, North Carolina, South Carolina and West Virginia.

APPENDIX E

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P

Service Date
Apr. 29, 1981

INTERSTATE COMMERCE COMMISSION DECISION

No. MC-117344 (Sub-No. 285)X

THE MAXWELL CO.—
COMMODITY AND TERRITORIAL BROADENING
(Cincinnati, OH)

Decided: April 16, 1981

Upon consideration of the appeal and petition for stay of Steere Tank Lines, Inc.; and applicants' reply.

Appellant seeks to appeal the decision of the Restriction Removal Board and stay the effectiveness of the decision issued thereto, pursuant to the appellate procedures of 49 CFR 1137.14(c). Under 49 CFR 1137.14(c), appellant must show that there are extraordinary circumstances present requiring that we entertain its appeal. We conclude that Steere fails to demonstrate that any extraordinary circumstances are involved in this proceeding. The appeal and petition for stay shall, therefore, be denied.

It is ordered:

The appeal and petition for stay are denied because there is no showing of extraordinary circumstances in accordance with 49 CFR 1137.14(c).

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gilliam, and Alexis.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX F

TITLE 49, UNITED STATES CODE

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters;

(6) to encourage fair wages and working conditions in the transportation industry; and

(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price

options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier of passengers or water common carrier, respectively, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b) (1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commisison; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101 (a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

(4) The provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide—

(A) transportation to any community not regularly served by a motor common carrier of property certificated under this section;

(B) transportation services which will be a direct substitute for abandoned rail service to a community if such abandonment results in such community not having any rail service and if such application is filed within 120 days after such abandonment has been approved by the Commission;

(C) transportation for the United States Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions;

(D) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds; and

(E) transportation by motor vehicle of food and other edible products (including edible by-products but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the certificate, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this clause and provides to the Commission such information and records as the Commission may require.

(5) Notwithstanding any other provision of law, any carrier holding authority under paragraph (4)(D) of this subsection operating one or more commercial motor vehicles with a gross vehicle weight rating of 10,000 pounds or more shall be subject to commercial motor vehicle safety regulations promulgated by the Secretary of Transportation pursuant to this title with respect to its entire operations, including the operations of commercial motor vehicles with gross vehicle weight ratings less than 10,000 pounds.

(6) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of certificates to which the provisions of paragraph (4)(E) of this subsection apply.

(7) No motor common carrier of property may protest an application to provide transportation filed under this subsection unless—

(A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

(iii) it has performed service within the scope of the application during the previous 12-month period or has, actively in good faith, solicited service within the scope of the application during such period;

(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

(8) No motor contract carrier of property may protest an application to provide transportation filed under this subsection.

(9) Notwithstanding the provisions of paragraph (4) of this subsection, the provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide transportation for the United States Government of used household goods which transportation is incidental to a pack and crate service on behalf of the Department of Defense.

(c) A person must file an application with the Commission for a certificate to provide transportation as a motor common carrier or water common carrier. The Commission may approve any part of the application or deny the application. The application must—

(1) be under oath;

(2) contain information required by Commission regulations; and

(3) be served on persons designated by the Commission.

(d)(1) Subject to section 10927(a) of this title, each certificate issued to a person to provide transportation as a motor common carrier shall specify—

(A) the transportation to be provided by the carrier;

(B) any of the regular routes over which, any of the places between which, and off-route places at which, the carrier may provide transportation; and

(C) if transportation is not over regular routes or between specified places, the area in which the carrier may provide transportation.

(2) Under regulations of the Commission, a motor common carrier may occasionally deviate from the regular routes, or the places specified in the certificate, or both.

(3) If a motor common carrier transports passengers, the Commisison may authorize transportation of the passengers only over a regular route and between specified places, except to the extent the carrier is authorized to provide special or charter transportation.

(4) A certificate of a motor common carrier to transport passengers may include authority to transport—

(A) newspapers, baggage of passengers, express, or mail in the same motor vehicle with the passengers; and

(B) baggage of passengers in a separate motor vehicle.

(e) Each certificate issued to a person to provide transportation as a water common carrier shall specify each route over which, and each port between which, the carrier may provide transportation.

(f)(1) A motor common carrier may provide transportation under a certificate only if the carrier complies with conditions the Commission finds are required by public convenience and necessity, including conditions—

(A) on extending routes of the carrier; and

(B) to carry out requirements established by the Commission under this subtitle.

(2) The Commission may prescribe necessary conditions under which a water common carrier provides transportation, including conditions on extending routes of the carrier.

(3) The Commission may prescribe conditions when the certificate is issued and at any time thereafter. The Commission may not prescribe a condition preventing—

(A) a motor common carrier or water common carrier from adding to its equipment and facilities or its transportation within the scope of the certificate to satisfy business development and public demand; or

(B) a water common carrier, if the carrier has authority to provide transportation over completed parts of a waterway project authorized under law, from extending its transportation over the uncompleted parts of the project when opened for navigation to satisfy business development and public demand.

(g) A certificate issued under this section does not confer a proprietary or exclusive right to use the public highways or public waterways.

(h)(1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—

(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

(2) The regulations promulgated by the Commission pursuant to paragraph (1)(B) of this subsection shall provide for final Commission action upon an application not later than 120 days after the date the application is filed with the Commission, except that in extraordinary circumstances, the Commission may extend such deadline for a period of not to exceed 90 additional days. Such regulations shall also provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings. In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon

the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101(a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

(i) A person holding (1) a certificate issued under subsection (b) of this section to provide transportation as a motor common carrier of property, and (2) a permit issued under section 10923 of this subchapter to provide transportation as a motor contract carrier of property, may transport property under the certificate in the same motor vehicle and at the same time as property under the permit.

(j) A motor common carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

TITLE 49, CODE OF FEDERAL REGULATIONS

PART 1137—REMOVAL OF RESTRICTIONS FROM AUTHORITIES OF MOTOR CARRIERS OF PROPERTY

Subpart A—General

Sec.

1137.1 Purpose.
1137.2 Applicability of rules.
1137.3 Definitions.

Subpart B—Procedures

1137.10 Form and content of application.
1137.11 Notice.
1137.12 Participation of interested persons.

1137.13 Furnishing a copy of the application package to interested persons.
1137.14 Disposition of the application.
1137.15 Compliance

Subpart C—Guidelines for Determining Applications

1137.20 Scope of this subpart.
1137.21 Commodity descriptions.
1137.22 Intermediate point service.
1137.23 Round-trip service.
1137.24 Territorial authority.
1137.25 Miscellaneous restrictions.
1137.26 Contract carriers.
1137.27 Limited term authority.
1137.28 Availability of other application procedures.
1137.29 Impact of restrictions removal.

AUTHORITY: 49 U.S.C. 10321 and 10922(h); 5 U.S.C. 553.

SOURCE: 45 FR 86757, Dec. 31, 1980, unless otherwise noted.

Subpart A—General

§ 1137.1 Purpose.

These regulations govern applications filed by motor carriers of property seeking to remove operating restrictions from their certificates or permits in order to:

(a) Broaden reasonably the categories of property authorized by the carrier's certificate or permit;

(b) Authorize transportation service to intermediate points on the carrier's routes;

(c) Provide round-trip authority where only one-way authority exists;

(d) Eliminate unreasonable or excessively narrow territorial limitations; or

(e) Eliminate any other restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

These regulations implement of 49 U.S.C. 10922(h)(1)(B) and 10922(h)(2).

§ 1137.2 Applicability of rules.

Applications may be filed under these rules to remove restrictions or to broaden authority in certificates and permits issued pursuant to applications filed before December 28, 1980.

§ 1137.3 Definitions.

(a) *County.* "County" means (1) a county in any State, a judicial district in Alaska, and a parish in Louisiana and (2) a city, town, or village in any State which is not administratively part of a county, New York, NY, and Washington, D.C., and their commercial zones as defined by the Commission.

(b) *STCC.* "STCC" means the Standard Transportation Commodity Code Tariff currently on file with the Commission at any given time.

Subpart B—Procedures

§ 1137.10 Form and content of application.

(a) *Form and filing requirements.* No application form is prescribed for filing applications under these rules. Applicants shall submit an original and one copy of their applications to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423. Applicants shall also file a copy of the complete application in the regional office of the Commission for the region in which they are domiciled. Applications shall be typewritten or printed on paper measuring approximately 8½ by 11 inches, with a 1½ inch left-

hand margin. Only the original need be signed. A check or money order payable to the Interstate Commerce Commission covering the applicable filing fee must accompany the application. The envelope containing the application and check shall be clearly marked "RESTRICTION REMOVAL APPLICATION". Also each application shall be clearly marked, in the upper right-hand corner of the top page: "RESTRICTION REMOVAL".

(b) *Information which shall accompany the application.* The application shall contain the following information, in the same order as set forth below:

(1) The exact name and address of the applicant and the docket number assigned by the Commission to the applicant's authorities.

(2) The name, address, and telephone number of applicant's representative.

(3) A copy of the certificate or permit from which applicant seeks to have restrictions removed or which it proposes be broadened.

(4) A proposed draft of the certificate or permit (commodity and territorial descriptions) with the restrictions removed or the authority broadened as proposed, together with sufficient information for the Commission to determine readily the precise portions of the existing authority which applicant proposes be modified. The redrafted certificate or permit shall be in the same format as the original so that, if the application is granted, it can be issued promptly without further redrafting by the Commission.

(5) In the case of an application to remove a restriction of a type found by the Commission to be inappropriate (see § 1137.25(7) of this part), a reference to the Commission decision in which an identical

or substantially similar restriction was found inappropriate.

(6) A caption summary (an original and one copy) of the modifications proposed, suitable for publication in the FEDERAL REGISTER. The caption summary shall include *an accurate summary of the restrictions applicant seeks removed, the authority applicant seeks broadened under these rules, or the authority the applicant would hold if its application were granted. It shall also include the authority (including specific sub numbers) which would be superseded by a grant of the application. For example, a caption summary could state that, "The application seeks to modify Sub-Nos. 1-10, by broadening the commodity description in the authorities from liquid chemicals to chemicals or allied products; by replacing the plantsite restrictions in the authorities with county-wide authority in X, Y, and Z Counties, IL; and by eliminating the in bulk restriction* in *all of the named authorities.* The caption summary shall be double-spaced on plain white paper (no letter heads). Each summary will be checked by Commission staff for its accuracy and *failure to describe accurately the changes applicant seeks may result in a rejection of the application.*

(c) *Information that shall accompany the application.* The application shall include a statement describing the effect of the proposal upon one or more of the following factors:

(1) The consumption of energy resources;

(2) Potential cost savings and improved efficiency;

(3) The provisions of the transportation policy set forth in 49 U.S.C. 10101(a); or

(4) The provision and maintenance of service to small and rural communities and small shippers.

(d) *Related restriction removal.* Applicants are expected to combine reasonably related restriction removal requests or requests for broadening of authority in a single application. Two categories of requests are generally considered related: (1) requests related to the same certificate or permit authority. An example of this category would be a carrier which holds a one-way certificate and desires to obtain backhaul authority as well as to broaden its territorial and commodity authority under these rules. (2) Requests seeking to remove the same restriction, or restrictions having a similar effect, from different authorities. An example of this would be a carrier which desires to remove the same equipment restriction from a number of certificates under these rules. In applications combining requests as described above, each request shall be clearly marked and segregated, and each request shall comply with the requirements set forth in § 1137.10(b)(3), (4), (5), and (6). Failure to comply will result in a rejection of the application. Carriers are free to file consolidated applications which do not fit into the two categories described above.

(e) *Incomplete applications.* Due to the time limits imposed by 49 U.S.C. 10922(h)(2), the Commission cannot await the supplementing of incomplete applications or make extensive revisions to draft FEDERAL REGISTER captions. The failure to submit a complete application or to include a proper caption summary will result in rejection of the application.

(f) *Repeat applications.*—A certificate or permit can be reformed under these rules more than one time. However, a restrictions removal application shall not be filed before a preceding application to reform the same authority has been processed by the Commission.

§ 1137.11 Notice.

Notice to the public of the filing of an application under these rules will be given by the Commission through publication of a caption summary in the FEDERAL REGISTER. Applicant shall deliver (by mail or in person) a copy of the caption summary to the State transportation board or official of applicant's domicile. Applicant shall mail a copy of the application to this State board or official or any State through which the operations described in the application would be performed upon their written request. Applicant shall make copies of the application available for public inspection at its principal place of business and at the office of its representative if at a different location. A copy of the application is also available for inspection at the ICC, Washington, D.C., Office of the Secretary.

§ 1137.12 Participation of interested persons.

Any interested person may comment on the applicant's proposal. Comments (an original and one copy) shall be filed with the Commission within 25 days of the date of publication of notice of the application in the FEDERAL REGISTER. The envelope containing the comment and the comments shall be clearly marked "RESTRICTION REMOVAL COMMENTS." Comments shall be directed to either (1) the merits of the particular proposal, or (2) whether the proposal should properly be considered under these rules.

§ 1137.13 Furnishing a copy of the application package to interested persons.

Applicant's representative is required to furnish a copy of the application package to interested persons

after publication. The request must be in writing and must contain a check or money order for $10, payable to applicant's representative. Applicant's representative need not supply copies to any person not sending the appropriate payment. Applicant is required to mail the copy within 5 days of receipt of the request. Non-compliance with this section by applicant may result in dismissal of the application.

§ 1137.14 Disposition of the application.

(a) *Basis for determining the application.* Except in extraordinary circumstances, applications will be determined solely on the basis of the application itself and any comments that are received. There will be neither oral hearings nor the opportunity for the submission of evidence under modified procedure.

(b) *The Commission's decision.* Applications will be published in the FEDERAL REGISTER in the form of tentative decisions granting the authority requested. If no comments are filed, the application will stand granted at the *conclusion of the 25-day comment period,* unless the Commission, prior to that time, stays the effectiveness of the tentative decision.

(c) *Administrative finality and appeals.* A decision disposing of an application subject to these rules is a final action of the Commission. Review of such an action on appeal is discretionary and is governed by the Commission's appeal regulations at 49 CFR 1100.98. Any party seeking review should specify the "extraordinary circumstances" involved in the proceeding to enable the Commission to extend the deadline for final Commission action an additional 90 days.

§ 1137.15 Compliance.

A reformed certificate or permit will be issued upon a grant of an application. Prior to beginning opera-

tions under the newly issued authority, compliance must be made with the following statutory and regulatory requirements: (a) for motor common carriers—49 CFR 1043, 1044, and 1310, and (b) for motor contract carriers—49 CFR 1043, 1044, and 1310.

Subpart C—Guidelines for Determining Applications

§ 1137.20 Scope of this subpart.

This subpart contains guidelines designed to assist applicants in filing applications for the removal of operating restrictions. The guidelines indicate certain types of restrictions or operating limitations in operating authorities which the Commission considers, under normal circumstances, to be excessively narrow, wasteful of fuel, inefficient, or contrary to the public interest. They suggest ways in which some such restrictions might reasonably be eliminated or in which limited authorities might be broadened. The guidelines are not intended to constitute a prejudgment of any individual application.

§ 1137.21 Commodity descriptions.

(a) *General commodities carriers.* Where a carrier is authorized to transport general commodities, restrictions having the effect of precluding the transportation of classes A and B expolsives are not considered unduly restrictive and are not normally subject to removal under these procedures. Other restrictions on the commodities which a general commodities carrier may transport are considered unduly restrictive and may normally be removed under these procedures.

(b) *Named commodities or limited classes of commodities.* Where a carrier is authorized to trans-

port one or more named commodities, the authority is considered unduly restrictive and may normally be broadened under these procedures. The same is true where a carrier is authorized to transport a limited class of commodities, except as indicated in subsection (c) of this section. Commodity classes which carry designations of three digits or more in the Standard Transportation Commodity Code are normally considered unduly narrow. Use of these procedures is normally appropriate for applications which seek—

(1) To expend such a commodity authorization to the two-digit STCC level;

(2) To replace such an authorization with a commodity description contained in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952) and 766 (1953); or,

(3) To replace such an authorization with a broader class description generally accepted by the Commission, such as commodities in bulk, commodities which because of their size or weight require special equipment, or oilfield commodities as described in *Mercer Extension-Oilfield Commodities*, 74 M.C.C. 459 (1946).

(c) *Commodities dealt in by a particular business.* Where a carrier is authorized to transport "such commodities as are dealt in by" a particular industry, such as mail order houses or retail grocery stores, the authority is not considered excessively narrow, and applications for modification should not normally be filed under these procedures.

§ 1137.22 Intermediate point service.

Certificates which authorize regular-route service and preclude service at intermediate points on the carrier's service routes, either by way of a specific restriction against performing such service or by

virtue of the fact that they allow service at certain intermediate points but fail to name other points, are considered unreasonably restrictive. Use of these procedures is appropriate for seeking removal of any restriction or operating condition which inhibits service at intermediate points on a regular-route carrier's service route.

§ 1137.23 Round-trip service.

Certificates or permits which authorize service in one direction only are considered unduly restrictive. Use of these procedures is appropriate for applications which seek return movement authority limited to the same commodities the carrier is authorized to transport on the outbound trip or applications which seek to expand the round-trip authority in a manner described in § 1137.21. Implied in the round-trip commodity description is materials, equipment, and supplies in both directions.

§ 1137.24 Territorial authority.

(a) *Less than county-wide authority.* Except as indicated in paragraph (b) of this section, authorizations to serve a territory less extensive than a county (including authorizations to serve named facilities or limited in a similar manner) are considered excessively narrow. Use of these procedures is normally appropriate for applications seeking the expansion of territorial authority to include all points in the county in which the authorized service point (including any portion of the commercial zone of an authorized point) or other limited service area is located. Where an authorized service point is located within a given city as well as a county, an applicant can seek expansion of authority to the city (which includes implied authority of points in its commercial

zone). Use of these procedures is also normally appropriate for applications to remove restrictions which preclude service at points or areas smaller than a county.

(b) *Service at facilities not precisely located.* Where a carrier has authority to serve a broad territory limited to service at the facilities of a specified person, company, or type of business, and where the precise location of the facilities, by reference to a city, county, or the like, is not apparent from the certificate or permit, the limitations are not considered excessively narrow, and applications for modification should not normally be filed under these procedures. These procedures can, however, be used to expand authority limited to a particular business' facilities at named points.

§ 1137.25 Miscellaneous restrictions.

Use of these procedures are normally appropriate for applications seeking the removal of the following types of restrictions, which the Commission considers to be contrary to the public interest.

(a) Restrictions which require or preclude the use of a specific type of equipment, such as "in tank vehicles" or "except in dump or hopper type equipment."

(b) Restrictions which have the effect of preventing a common carrier from participating in joint-line service with another carrier or from handling traffic having prior or subsequent movement by any mode of transportation or type of carrier.

(c) Restrictions which impose size or weight limitations, or both. This does not include restrictions relating to shipments weighing 100 pounds or less under certificates granted under the so-called "fitness only" procedures in 49 U.S.C. 10922(b)(4)(D).

(d) Restrictions which specify Canadian and Mexican destinations or origins to be served, or designate specific port of entry points which must be used.

(e) Restrictions which limit the movements of a common carrier to transportation performed on freight forwarder bills of lading.

(f) Restrictions which limit the services an irregular-route carrier can provide to traffic moving through a named point, area, or State. For example, irregular-route authority "limited to the transportation of traffic moving from, to, or through points in (a specific State)."

(g) Restrictions which the Commission has found to be inappropriate and has refused to impose in another proceeding.

§ 1137.26 Contract carriers.

Where a permit of a contract carrier limits the carrier's territorial scope of service for a named shipper, shippers, or a class of shipper, such authority is considered unduly restrictive. Use of these procedures is normally appropriate for applications seeking to broaden the territorial scope of such permits. Such applications can request authority to serve the single-named shipper, shippers, or class of shippers, "between points in the United States." The commodity description in contract permits can be broadened, and unreasonable restrictions removed, to the extent specified in Subpart C of this Section.

§ 1137.27 Limited term authority.

Certificates and permits limited to a specified duration ("term" limitation) can be modified under these procedures to the same extent as authority without a term limitation. Any modified authority approved

under these rules will contain the same limitation as the original authority. These procedures cannot be used to remove the limited term condition from existing authority.

§ 1137.28 Availability of other application procedures.

The provisions of this subpart which describe as inappropriate the use of these procedures for applications seeking the elimination of certain types of restrictions or the modification of certain types of limited authorities should not be consulted as discouraging the filing of applications seeking such relief pursuant to the Commission's normal application procedures under 49 U.S.C. 10922(b) and 10923(b).

§ 1137.29 Impact of restrictions removal.

The Commission has found that, under normal circumstances, the elimination of restrictions or the modification of authorities designated in this subpart as unduly restrictive, unreasonable, excessively narrow, or contrary to the public interest will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a), and will assist in providing and maintaining service to small and rural communities and small shippers.

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No. 82-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,

Petitioner

v.

STEERE TANK LINES, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT STEERE TANK LINES, INC. IN OPPOSITION

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STATEMENT

In January 1981, The Maxwell Co., pursuant to restriction removal regulations of the Interstate Commerce Commission,[1] filed an application seeking to expand the scope of one

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[1]The Commission's restriction removal regulations, codified at 49 C.F.R. Part 1137 *et seq.*, purported to implement the Motor Carrier Act of 1980. Pub. L. No. 96-296, 94 Stat. 793, 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h). Those regulations, however, were overturned by another panel of the Fifth Circuit court of appeals which found that asserted guidelines were in fact binding rules which exceeded the Commission's statutory authority. *American Trucking Associations, Inc. v. ICC*, 659 F.2d 452 (5th Cir. 1981) (the "ATA case"). Subsequently, that court issued a writ of mandamus to enforce its prior final opinion. *American Trucking Associations, Inc. v. ICC*, 669 F.2d 957 (5th Cir. 1982), pending on petition for a writ of certiorari as *Interstate Commerce Commission v. American Trucking Associations, Inc., et al.*, No. 82-86 (filed on July 9, 1982).

of its existing certificates of public convenience and necessity. Maxwell's original certificate allowed it to transport a single commodity, spent silica gel catalyst in bulk, between portions of 23 states with certain major restrictions. Relying solely on the Commission's regulations, Maxwell sought to broaden this certificate to authorize the transportation of all commodities in bulk between points in 23 states.[2]

The Commission, over timely objections concerning the reasonableness of the proposed expansion, granted the application based only upon its restriction removal regulations which were on appeal in *ATA* (Pet. App. 11a-12a). An administrative appeal by Steere was to no avail (Pet. App. 15a).

The court of appeals remanded for reconsideration in light of its prior decision in the *ATA* case (Pet. App. 6a). It held that the Commission had erroneously relied only on rules previously invalidated in *ATA* (Pet. App. 3a). Specifically, the Court found that to broaden "spent silica gel catalyst" to "commodities in bulk" was unreasonable because "[t]he record contains no evidence to support a conclusion that the carrier is 'fit, willing, and able to provide the transportation authorized by the certificate'" (Pet. App. 6a). However, the court refused to substitute its judgment for the Commission's as to what the ultimate grant of authority should be (Pet. App. 6a).

The decision of the court of appeals is correct and plenary review by this Court is not warranted.

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[2]The only relevant issue in the case is that of commodity expansion. The applicable Commission rule, 49 C.F.R. 1137.21(b), required Maxwell to replace its one named commodity with "a broader class description generally accepted by the Commission, such as commodities in bulk. . . ." *See* Pet. App. 34a-35a.

ARGUMENT

1. Underlying the Commission's petition is its contention that the court of appeals erred in requiring the agency to make findings in this case that the applicant is fit, willing, and able to perform the proposed service (Pet. 7-12). This issue is not subject to review. The holding that the Interstate Commerce Act requires such findings in restriction removal applications was settled in the *ATA* case. *American Trucking Associations, supra*, 659 F.2d at 464.[3]

Plainly, the Commission's attempt to litigate this issue in this case is nothing more than an impermissible collateral attack on the *ATA* case. This Court has consistently recognized that a court should refuse to review an issue framed in an attempt to overturn a previous conclusive judgment on the same issue. *Allen v. McCurry*, —U.S.—, 101 S.Ct. 411, 414-15 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The Commission's rights on this issue were determined at the time the court of appeals decided *ATA*, and thus the agency was required to seek further review of that decision if it desired to urge any error. *See United States v. Hancock Truck Lines*, 324 U.S. 774, 778-80 (1945).

Moreover, the court of appeals was entitled to rely upon the finality of its original decision in *ATA* in reaching its

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[3] As fully developed in the Brief for Respondents in Opposition in No. 82-86 (filed on August 16, 1982), in which Steere joined, the ATA opinion at 659 F.2d 452 is not subject to review pursuant to 28 U.S.C. 2101(c) because the Commission failed to file a timely petition seeking certiorari. Given the Commission's failure, it is inappropriate to consolidate this case with No. 82-86 (Pet. 15, n.7), as such action would permit the agency to achieve indirectly what it may not do directly.

subsequent decisions in this case. In both the remand decision and denial of rehearing by the court, it clearly was aware that the Commission's time for seeking further review of *ATA* had expired. Sound judicial policy demands that a court of appeals should follow established precedent, especially that within its own circuit. *Montana, supra*, 440 U.S. at 153-54.

2. The only other contention raised by the Commission is that the court of appeals improperly substituted its judgment for the agency's as to what constitutes a reasonable broadening of certificates under the statute (Pet. 12-14). The lower court considered *only* the record before it. In so doing, it concluded that the "record contains no evidence" to show that Maxwell had made "a prima facie showing in its application that it is fit, willing, and able" to transport all bulk commodities (Pet. App. 6a). Thus, contrary to the Commission's assertion, the court of appeals did not broaden its original decision in the *ATA* case, but simply followed it. *Compare American Trucking Associations, supra*, 659 F.2d at 464.[4]

The Commission deliberately misreads the court's decision by asserting that expansion from one commodity to all commodities within a broad description is foreclosed "as a matter of law" (Pet. 13). As demonstrated by the remand of Maxwell's application, the court expressly left for the Commission's determination what factual showing of fitness, willingness, and ability is necessary to support the ultimate grant

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[4]Moreover, there is consistency in the circuits which have considered the reasonableness of Commission actions permitting broadening of commodity descriptions. *Ritter Transportation, Inc. v. ICC*, No. 81-2116 (D.C. Cir., decision dated July 27, 1982) (Resp. App. 1a-5a).

of authority (Pet. App. 6a). Consequently, the court of appeals has not in any manner infringed upon the Commission's discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Steere Tank Lines, Inc.

AUGUST 1982.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2116

RITTER TRANSPORTATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

PORT NORRIS EXPRESS CO., INC., INTERVENOR

Petition for Review of an Order of the
Interstate Commerce Commission

Argued May 21, 1982

Decided July 27, 1982

Michael D. Bromley with whom *Chester A. Zyblut* was on the brief, for petitioner.

Colleen J. Bombardier, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, and *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, were on the brief, for

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

respondents. *John Broadley*, Attorney, Interstate Commerce Commission also entered an appearance for respondent Interstate Commerce Commission. *Robert B. Nicholson* and *George Edelstein*, Attorneys, Department of Justice, entered appearances for respondent United States of America.

William P. Jackson, Jr. was on the brief, for intervenor.

Before: EDWARDS and GINSBURG, *Circuit Judges*, and JAMESON,* *Senior District Judge* for the District of Montana.

Opinion for the Court filed by *Senior District Judge* JAMESON.

JAMESON, *Senior District Judge:* Ritter Transportation Inc. seeks to review and set aside a decision of the Interstate Commerce Commission granting the application of Port Norris Express Co. Inc. to broaden the commodities authorized in its certificate of public convenience and necessity. A certificate issued in 1973 authorized Fort Norris to transport "cullet in bulk" (broken glass) between points in 12 states and the District of Columbia. Following the enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), the ICC, pursuant to the Act and rules and guidelines promulgated by the Commission, granted Port Norris' application to broaden its authority to "commodities in bulk". Ritter contends, *inter alia*, that the Commission arbitrarily failed to consider whether Port Norris is "fit, willing, and able" to transport "commodities in bulk". For the reasons set forth below we vacate the ICC's order granting Port Norris' application and remand to the Commission for further proceedings.

The Motor Carrier Act of 1980 requires the Commission to implement, by regulation, procedures to process removal of operating restrictions in order to . . . *reasonably broaden* the categories of property authorized by the carrier's certificate or permit. . . ." 49 U.S.C.A. § 10922(h) (1) (B) (i)

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

(West. Supp. 1981) (emphasis added). However, as noted by the Fifth Circuit Court of Appeals,

> In mandating the removal of unreasonable restrictions, the statute does not dispense with the [Act's] primary requirement that every carrier be "fit, willing and able to provide the transportation to be authorized by the certificate." [42 U.S.C.A. § 10922(a)(1)(A) (West Supp. 1981)].

American Trucking Associations, Inc. v. I.C.C., 659 F.2d 452, 464 (5 Cir. 1981).

In *Steere Tank Lines, Inc. v. I.C.C.*, 666 F.2d 255 (5 Cir. 1982) *("Steere I")*, the court reviewed an ICC decision involving the identical question here presented.[1] The court concluded:

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization. We do not suggest that such a showing must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

Id. at 258. Because the applicant had made no such showing, the case was remanded for reconsideration in the light of *American Trucking Associations.*[2]

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[1]The Commission recognizes that the facts in *Steere I* "are substantially similar to the facts in this case," but argues that the Steere decision "imposes an unreasonable burden upon applicants for restriction removal."

[2]The same question was raised in *Steere Tank Lines, Inc. v. I.C.C.*, 667 F.2d 490 (5th Cir. 1982) *("Steere II")*. Again recognizing the necessity of finding an applicant "fit, willing, and able" to provide expanded service, the case was dismissed as moot after the ICC granted a new certificate in which the applicant was determined to be "fit, and able" to provide bulk service in separate proceedings on the new application.

We agree with the Fifth Circuit that the Motor Carrier Act of 1980 did not repeal *sub silentio* § 10922(a)(1)(A)'s requirement that an applicant be found "fit, willing, and able to provide the transportation for which it is seeking authorization." *Steere I, supra.* The term "reasonably broaden", as used in § 10922(h)(1)(B)(i), includes a consideration of whether the applicant is "fit, willing, and able."

The Commission properly noted that the scope of review is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .," 5 U.S.C. § 706(2)(A). We recognize that under this standard the scope of review is a narrow one. The reviewing court "must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). "[A] finding that a decision is not 'arbitrary or capricious' clearly must rest upon a corollary finding that the relevant factors upon which the decision is assertedly based are supported by some evidence. . . ." *Doe v. Hampton*, 566 F.2d 265, 271 n. 15 (D.C. Cir. 1977).

Although Port Norris' application detailed how expansion of its authority would conserve energy resources, improve efficiency, and increase both competition and revenues, no where does it indicate that Port Norris is "fit, willing, and able to provide the transportation authorized by the certificate." The ICC's decision to grant the application is likewise void of any consideration of these "relevant factors". Absent such a consideration, it cannot be said that the ICC "*reasonably* broadened" the categories of property authorized by the applicant's certificate. Its decision was arbitrary because the Commission failed to consider the relevant factor of whether the applicant was "fit, willing, and able" to perform the expanded service.

We agree also with the holding in *Steere I, supra*, that the showing that an applicant is fit, willing, and able "need not

be elaborate" and that the form and details of the showing "are, in the first instance matters that should be addressed to the Interstate Commerce Commission." Specifically, the time restraints of the Act contemplate the use of expedited procedures in restriction removal cases. *American Trucking Associations*, 659 F.2d 461.[3] The ICC retains broad discretion, within statutory limits, to define appropriate commodity categories. *Id.* at 464-65. Likewise, it has discretion in determining what facilities and equipment may be required.[4]

We vacate the order under review and remand to the Interstate Commerce Commission for further proceedings consistent with this opinion.

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[3]The Commission correctly notes that "Congress did not intend to invoke the full panoply of APA formal hearing requirements" and that the APA does not "require full-fledged adversary-type hearings in restriction removal cases."

[4]We agree with the Commission that an applicant should not "be compelled to buy all equipment necessary to transport every conceivable commodity encompassed by the expanded authority before the applicant even receives the authority it seeks."